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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1489

P. M. NESBITT,

Appellant,

vs.

EDWIN M. GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT OF JURISDICTION UNDER RULE 12

Appellant submits the following statement of the basis on which it is contended the Supreme Court of the United States has jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of North Carolina:

A

Statutory Provisions Believed to Sustain Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under Section 237(a) of the Judicial Code as amended by the act of February 13, 1925, Chapter 229, 43 Stat. 937, U. S. Code, Ann., Title 28, Section 344.

The judgment of the Supreme Court of North Carolina is a final judgment in this suit under Article IV, Sections 2 and 8 of the Constitution of the State of North Carolina and Sections 1-235, 1-297, 1-298, 7-11 and 7-12 of the General Statutes of North Carolina and as construed and applied in

Alspaugh v. *Winstead*, 79 N. C. 526 (1878);

Corporation Commission v. *Atlantic Coast Line R. Co.*, 187 N. C. 424, 121 S. E. 767 (1924), affirmed 206 U. S. 1, 51 L. Ed. 933 (1906);

Chavis v. *Brown*, 174 N. C. 122, 93 S. E. 471 (1917), and

Davis v. *Storage Company*, 186 N. C. 676, 682, 120 S. E. 462.

B

The Statute of the State, the Validity of Which Is Involved

The statute or act passed by the Legislature of North Carolina, the validity of which as amended is drawn in question and which it is contended is unconstitutional and repugnant to Article 1, Section 8 of the Constitution of the United States and the 14th Amendment of the Constitution of the United States is Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939, pages 213 to 216 inclusive, which act was duly amended by the Legislature by Subsection "E" of Section 3, Chapter 50 of the Public Laws of North Carolina, Session 1941, page 68, which said act as so amended reads as follows:

> "*Dealers in horses and/or mules.* Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual

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tax for each location where such business is carried on as follows:

Where not more than one carload of horses and/or mules is purchased for the purpose of resale	$25.00
Where more than one carload and not more than two carloads of horses and/or mules are purchased for the purpose of resale	50.00
Where more than two carloads of horses and/or mules are purchased for the purpose of resale	100.00

"For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25) and purchases for the preceding license tax year shall be used as a medium for arriving at the amount of tax due for the ensuing year: Provided, however, that if during the current license year horses and/or mules are purchased for the purpose of resale in such quantities that would establish liability for a greater tax than that previously paid, it shall be immediately remitted to the commissioner of revenue with the license which has already been issued in order that it may be canceled and a corrected license issued.

"In addition to the above license, every person, firm, or corporation engaged in the business of purchasing for the purpose of resale and/or selling horses and/or mules at public auction, either on his or its own behalf or for any other person, whether a commission or fee is or is not charged, shall apply for and procure from the commissioner of revenue a state license for each place of auction and shall pay for such license an annual tax of one hundred dollars ($100.00).

"In addition to the above license, every transient vendor of horses and/or mules who has no permanent or established place of business in this state shall apply for and procure from the commissioner of revenue a state license for each county in which horses and/or

mules are sold and shall pay for such license an annual tax of three hundred dollars ($300.00).

"(a) In addition to the annual licenses levied in this section, every person, firm, or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per head on all such horses and/or mules purchased for the purpose of resale. 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however, that 'purchases' shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. 'Purchases' shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this state by railroad or brought in otherwise.

"The original or first dealer or consignee, purchasing or receiving horses and/or mules in this state, shall be primarily liable for payment of the additional per-head tax levied in this section. Horse and/or mule auctioneers, engaged in the business of purchasing, acquiring or receiving on consignment, account or otherwise, either as principal or agent, horses and/or mules from out-of-state dealers or other persons and selling same at either private or public auction, shall be primarily liable for payment of the additional per-head tax levied in this section unless sold to a licensed dealer for the purpose of resale. In order to avoid double taxation, dealers purchasing or acquiring horses and/or mules from another established dealer located within this state may be relieved of reporting the additional per-head tax on such horses and/or mules acquired from

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another dealer located within this state, proveded an official receipt or statement from the commissioner of revenue or his duly authorized agents is produced, showing that the additional per-head tax levied in this section has been paid.

"The additional per-head tax levied in this section on purchases of horses and/or mules purchased for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this state. The commissioner of revenue may, however, in his discretion, where he thinks circumstances justify it, permit licensed and established dealers to file monthly reports, which reports shall be due to be filed on or before the fifteenth (15th) of each month for all purchases during the preceding month, and such report when filed shall be accompanied by a remittance for the amount of tax shown to be due. Reports shall be filed in such form and in such manner as may be prescribed by the commissioner of revenue, and failure to file the report herein prescribed and pay the tax as shown to be due thereon shall subject such dealer to a penalty of five per cent (5%) of the amount of tax due for each month or fraction thereof that such report may be delinquent.

"(c) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall keep a full, true and accurate record of all purchases and sales, including purchase invoices and freight bills covering such purchases and sales of all horses and/or mules until such purchases and sales, including purchase invoices and freight bills, have been checked by a duly authorized agent of the commissioner of revenue. Failure to comply with the provisions of this section in this respect shall be prima facie evidence of attempting to evade the additional taxes levied in this section and shall subject such dealer, in addition to all other penalties imposed by this article, to the additional per-head tax on all purchases and/or sales from whatever source such horses and/or mules are acquired or received, and

it shall be the duty of the commissioner of revenue or his duly authorized agents to assess the additional tax upon an estimation of purchases and/or sales from the best information obtainable.

"(d) As a condition to the issuance or the continuance of the annual license levied in this section, and in order to secure the payment of the additional per-head tax levied on purchases and/or sales in this section, the commissioner of revenue may in his discretion, when it appears reasonably necessary therefor, require any dealer in horses and/or mules, applying for a license under this section, to post a surety bond or other adequate security sufficient to guarantee and secure the payment of any tax due under this section.

"(e) Any person, firm, or corporation, required to procure from the commissioner of revenue a license under this section, who shall purchase and sell or offer for sale by principal or agent any horses and/or mules without first having obtained such license, or shall fail, neglect or refuse to file any report and pay the additional taxes levied in this section when due and payable, shall in addition to the other penalties imposed by this article, be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars ($100.00) and/or imprisoned not less than thirty days (30) within the discretion of the court."

C

The Date of the Judgment and the Application for Appeal

The decree and judgment sought to be reviewed was entered in the Supreme Court of the State of North Carolina on the 5th day of March, 1947. (Reported in 227 N. C. (Advance Sheets) page 174.)

The petition for appeal, assignment of errors and prayer for reversal were presented to the Chief Justice of the Supreme Court of the State of North Carolina on the 29th day of May, 1947, and the order allowing said appeal was

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executed and the appeal bond approved on the 29th day of May, 1947.

D

Nature of the Case and Rulings Below

The appellant, a citizen and resident of Buncombe County, North Carolina, on or about March 15, 1943, by and through his duly authorized agent, purchased seventy-eight horses at ranches located in and about Sidney, Montana, which horses were shipped by appellant from Sidney, Montana, to Asheville, North Carolina, during the months of March, June and July, 1943 (R. P. 26).*

The respondent Commissioner of Revenue of North Carolina, thereupon on or about April 19, 1945, demanded that plaintiff pay to the Department of Revenue, State of North Carolina, the sum of $407.40, being taxes and penalties allegedly due under and by virtue of Section 115 of Chapter 158 of the Public Laws of North Carolina, Session 1939, as amended (R. P. 26).

Section 939, of Chapter 158 of the Public Laws of North Carolina, Session 1939, reads in part as follows:

> "No Court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense of rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the Commissioner of Revenue of the State if a state tax. . . ."

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* Refers to transcript of record from Supreme Court of North Carolina. Record in this case not yet printed.

The foregoing Act has been consistently construed by the Supreme Court of North Carolina to define the only remedy available to the taxpayer either to prevent collection of illegal taxes and assessments or to recover back taxes unlawfully or erroneously exacted.

Bunn v. *Maxwell*, Commissioner of Revenue, 199 N. C. 557; 155 SE 250 (1930);

Hunt v. *Cooper*, Sheriff of Bertie County, 194 N. C. 265; 139 SE 446 (1927);

Richmond and Ohio Railroad Co. v. *Town of Reidsville*, 109 N. C. 494; 13 SE 865 (1891).

And the Supreme Court of North Carolina has further ruled that strict compliance with the requirements of the above quoted statute is essential to recovery.

Bunn v. *Maxwell*, Commissioner of Revenue, *supra*; *Power Company* v. *Clay County*, 213 N. C. 698.

Pursuant to the terms of said statute the appellant, on November 3, 1945, paid the respondent, Commissioner of Revenue of North Carolina, the sum of $407.40, and on the same date notified respondent in writing that appellant paid said sum under protest. (R. P. 26.)

Thereafter, on or about November 9, 1945, and within thirty days after said payment under protest, appellant duly demanded in writing that respondent Commissioner of Revenue of North Carolina refund or repay to appellant the said sum of $407.40. This demand was denied by respondent in writing by letter dated January 24, 1946, in which receipt of demand was acknowledged. (R. P. 27.)

Thereupon, on the 16th day of April, 1946, appellant instituted this action to recover from respondent Commissioner of Revenue the aforesaid sum of $407.40. (R. P. 1, paragraphs 2 & 3.)

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In the complaint filed in this cause it was alleged by the appellant that Section 115 of Chapter 158 of the Public Laws of North Carolina, Session 1939, as amended was repugnant to Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment of the Constitution of the United States in that said act imposed a direct burden upon interstate commerce and in that said act imposed a tax upon a transaction consummated beyond the territorial limits of the State of North Carolina. (Complaint paragraphs 17, 18, 20, 22; R. P. 8 to 10, incl.)

The action came on for trial before William H. Bobbitt, Judge Presiding, at the regular December Civil term of the Superior Court of Buncombe County. (R. P. 1, paragraph 4.) At said trial the appellant introduced certain portions of the complaint and answer in which were alleged and admitted the facts hereinabove recited. (R. Pp. 25 to 27, incl.)

Appellant submitted the testimony of horse and mule dealers bearing upon the construction given this act by the Commissioner of Revenue and his deputies, which testimony was excluded upon objection by respondent. (R. Pp. 28 to 32, incl.)

Counsel for appellant and for respondent submitted argument to the trial court upon the question of the constitutionality of the said Act. (R. P. 28.)

The trial Court entered judgment in favor of Defendant-Respondent in which judgment the Court declared the said Act to be constitutional and valid. (See Judgment—R. Pp. 23 and 24.)

To the aforesaid judgment the Plaintiff-Appellant duly objected and excepted and appealed to the Supreme Court of North Carolina, (Record page 24) assigning as error the action of the trial Court in holding the statute constitutional and entering the judgment shown in the record. (Record, page 32; Record, page 23.)

The Supreme Court of the State of North Carolina is the highest court in the State and that court entered final judgment affirming the judgment of the Superior Court of Buncombe County, upholding the constitutional validity of the statute involved, and holding that such statute was applicable in the instant case. (Appendix A—Opinion of the Supreme Court of North Carolina.)

The Appellant contends that the Act in question imposes a direct and undue burden upon interstate commerce and is, therefore, unconstitutional, and repugnant to Article I, Section 8 of the Constitution of the United States and that the Act imposes a tax upon a transaction consummated beyond the territorial limits of the State of North Carolina and, as applied in the instant case, deprives Appellant of his property without due process of law and is, therefore, unconstitutional and repugnant to Amendment XIV, Section 1 of the Constitution of the United States.

The Appellant further specifically contends that the Act in question imposes an undue burden upon interstate commerce (1) in that said act exacts of persons, firms, and corporations engaged in the business of purchasing horses and mules for resale a tax, in addition to the fixed schedule of annual taxes imposed, of $3.00 per head on horses and mules purchased, which additional tax only first dealers and consignees receiving said horses and mules in the State of North Carolina are absolutely required to pay, thereby in practical operation and effect exaction an entrance duty, excise, or tariff of persons, firms, and corporations importing horses and mules into a non-stock raising State; (2) in that said act exacts a license tax of persons, firms, and corporations engaged in the business of purchasing horses and mules for resale, which tax is made proportionate to the number of horses and mules purchased, including horses and mules purchased in interstate commerce, without apportionment, thereby subjecting persons, firms, and corpo-

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rations purchasing horses and mules in interstate commerce to the risk of a multiple tax burden; and (3) in that said act in exempting purchasers of horses and mules for resale from the payment of additional $3.00 per head tax upon horses and mules accepted in part payment of horses and mules sold permits and allows an exemption to horses and mules bred in North Carolina not granted to horses and mules produced in foreign States.

The Supreme Court of the State of North Carolina considered these questions as to whether or not the Act was unconstitutional as applied to the Appellant in the instant case, and ruled that said Act did not violate the Commerce Clause or the Fourteenth Amendment of the Constitution of the United States.

E

Cases Believed to Sustain Jurisdiction

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

Eureka Pipe Line Co. v. *Hallahan*, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227 (1921);

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921);

Kansas City Southern Railway Co. v. *Road Improvement District No. 3*, 266 U. S. 379, 69 L. Ed. 335 (1924);

Best & Co. v. *Maxwell*, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. (1940).

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and that the inquiry, then, is whether Section 115 of Chapter 158 of the Public Laws of North

Carolina, Session 1939, as amended by Subsection "E," Section 3, Chapter 50 of the Public Laws of North Carolina, Session 1941 is constitutional as applied and enforced in respect to the instant case.

Respectfully submitted,

LAMAR GUDGER,
Counsel for Appellant.

SILAS G. BERNARD,
Of Counsel for Appellant.

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APPENDIX A

Opinion of the Supreme Court of the State of North Carolina

IN THE SUPREME COURT OF NORTH CAROLINA

Spring Term, 1947

No. 96—Buncombe

P. M. Nesbitt

vs.

Edwin M. Gill, Commissioner of Revenue of North Carolina

Appeal by plaintiff from Bobbitt, J., at December Term, 1946, of Buncombe.

This is an action to recover taxes paid under protest.

The plaintiff, a citizen and resident of Buncombe County, North Carolina, on or about 15 March, 1943, purchased seventy-eight horses from ranches located in the State of Montana, and had them shipped to him at Asheville, N. C., during the months of June and July, 1943. Thereafter, on or about 3 April, 1945, the plaintiff paid the defendant, under protest, the sum of $407.40, which represented the taxes due the State, by the plaintiff, including penalties for late filing, under the provisions of Section 115 of the Public Laws of 1939, G. S. 105-47. Demand for the refund of the tax and penalties was duly made. The defendant refused to make the refund, and this action was duly instituted.

Upon the pleadings and evidence offered in the trial below, the Court held: That the tax levied by the aforesaid statute is a valid license or privilege tax upon the business of purchasing horses and/or mules for resale within the State of North Carolina; that it applies alike to purchases of horses and/or mules raised within or without the State and is applicable only to horses and/or mules purchased for resale within the State of North Carolina, and entered judgment that the plaintiff recover nothing by his action

and that the same be dismissed. Plaintiff appeals to the Supreme Court, assigning error.

Lamar Gudger and Don C. Young for plaintiff.

Attorney General McMullan and Assistant Attorneys General Spruill and Moody for defendant.

DENNY, J.:

The plaintiff alleges and contends that Section 115 of the Revenue Act of 1939, as amended, purporting to levy the tax involved herein, is unconstitutional, in that: (1) Purchasing horses and/or mules for resale is not a trade or profession within the meaning of Article V, Section 3, of the Constitution of North Carolina; (2) The levy of a head tax of $3.00 upon horses and/or mules purchased for the purpose of resale exacted by subsection (a) of Section 115, of said Revenue Act, as amended, is a tax on property and as such is unconstitutional and void, being in violation of the aforesaid Section of our State Constitution; (3) The Act does not levy a head tax on horses and/or mules raised in North Carolina and is therefore, in contravention of Article I, Section 8, clauses 1 and 3, of the Constitution of the United States; and (4) The head tax levied under the Act imposes an undue burden upon interstate commerce by subjecting interstate purchases of horses and/or mules to the risk of multiple taxation and by exempting "horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section" from said tax.

The pertinent parts of Section 115, of the Revenue Act of 1939, as amended, now G. S. 105-47, read as follows:

"Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual tax for each location where such business is carried on as follows:

"Where not more than one carload of horses and/or mules is purchased for the purpose of resale.....$25.00.

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"Where more than one carload and not more than two carloads of horses and/or mules are purchased for the purpose of resale.....$50.00.

"Where more than two carloads of horses and/or mules are purchased for the purpose of resale.....$100.00.

"For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25).

"(a) In addition to the annual licenses levied in this section, every person, firm or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per-head on all such horses and/or mules purchased for the purpose of resale. 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however that 'purchases' shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. 'Purchases' shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this state by railroad or brought in otherwise. * * *

"(b) The additional per-head tax levied in this section on purchase of horses and/or mules purchased for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this state."

Article V, Section 3, of our State Constitution, among other things, provides that "The power of taxation shall be exercised in a just and equitable manner. Taxes on property shall be uniform as to each class of property

taxed. * * * The General Assembly may also tax trades, professions, franchises and incomes." The appellant contends that the business of purchasing horses and/or mules for the purpose of resale in North Carolina is not a trade within the meaning of the above section of our Constitution. This contention is not in accord with the uniform decisions of this Court. In defining the meaning of the word "trades," as used in the above Sections of our Constitution, in the case of State *v.* Worth, 116 N. C., 1007, 21 S. E., 204, this Court said: "This word trade is often used in a more restricted sense to mean either the particular occupation of a mechanic or a merchant; but where it is used in defining the power to tax its broadest signification is given to it and it is interpreted as comprehending not only all who are engaged in buying and selling merchandise but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or profit." This interpretation as to the meaning of the word "trades," as used in the above Section of our Constitution, has been approved in Mercantile Co. *v.* Mount Olive, 161 N. C., 121, 76 S. E., 690; Bickett *v.* Tax Commission, 177 N. C., 435, 99 S. C., 415; State *v.* Elkins, 187 N. C., 533, 122 S. E., 289; Hilton *v.* Harris, 207 N. C., 465, 177 S. E., 411 and State *v.* Dixon, 215 N. C., 161, 1 S. E. (2d.), 521. Hence, we hold that when a person, firm or corporation, in North Carolina, engages in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules, such person, firm or corporation is a dealer in said animals, and as such is pursuing a trade within the meaning of that term as used in Article V, Section 3, of our State Constitution.

The appellant challenges the validity of the per head tax on the ground that it is a property and not a privilege or license tax, and lacks that uniformity required for ad valorem taxes.

Prior to the enactment of Section 115, of the Revenue Act of 1939, as amended, any person, firm or corporation engaged in the business of purchasing and selling horses and/or mules in North Carolina, was required to pay a minimum license tax of $12.50 for the privilege of selling

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one carload of horses and/or mules, and $5.00 for each additional carload purchased. In computing the tax twenty-five horses and/or mules were considered a carload and when a car contained in excess of that number an additional tax of twenty-five cents per head in excess of twenty-five, was required to be paid. In addition thereto, a sales tax of 3% was levied for the privilege of carrying on said business. In 1939, the annual license and head tax, was substituted, as set forth herein, and the sales of horses and/or mules were expressly exempted from the sales tax. G. S. 105-169, Subsection (n).

The General Assembly is not restricted to uniformity as between trades or professions in levying a privilege or license tax. However, the tax must apply equally to all persons belonging to the prescribed class upon which it is imposed. Gatlin *v.* Tarboro, 78 N. C., 122; Smith *v.* Wilkins, 164 N. C., 135, 80 S. E., 168; Provision Co. *v.* Maxwell, Comr. of Rev., 199 N. C., 661, 155 S. E., 557; Leonard *v.* Maxwell Comr. of Rev., 216 N. C., 89, 3 S. E. (2d.), 316. If a privilege or license tax is reasonable and just, and applies alike in its exactions and exemptions to all persons belonging to the prescribed class or business, it is not objectionable under the provisions of the Constitution of North Carolina for lack of uniformity. In Leonard *v.* Maxwell, Comr. of Rev., Supra, Stacy, C. J., in speaking for the Court, said: "In levying a sales tax as a license or privilege tax, the General Assembly may set apart certain trades, callings, or occupations for imposition of the tax and exclude others from its operation. Smith *v.* Wilkins, 164 N. C., 136, 80 S. E., 168. The tax may be fixed at a flat rate for some, graduated as to others, and withheld from others. S. *v.* Carter, 129 N. C., 560, 40 S. E., 11; S. *v.* Powell, 100 N. C., 526, 65 S. E., 424. One business may be taxed and another left untaxed. Carmichael *v.* Coal & Coke Co., 201 U. S., 495, 109 A. L. R., 1327. Reasonable selection or classification of the subjects for such taxation may be made by the General Assembly and different rates or different modes and methods of assessment applies to different classes. Rosenbaum *v.* New Bern, 118 N. C., 83, 24 S. E., 1; S. *v.* Stevenson, 109 N. C., 730, 14 S. E., 385, 26 A. L. R., 595. A

wide latitude is accorded the taxing authorities in the selection of subjects for taxation, particularly in respect of occupation taxes. Oliver Iron Mining Co. *v.* Lors, 262 U. S., 172."

The amount of a privilege or license tax may be determined by the population of the city or town in which the business is to be conducted. Or, it may be determined by gross sales or the aggregate *n*aumber of sales of a commodity handled—such as cotton. Albertson *v.* Wallace, 81 N. C., 479, 103 A. L. R., 26n; Smith *v.* Watkins, supra. It has been the practice of our General Assembly for many years to levy what is considered a nominal sum for an annual license for engaging in some classes of trades and to levy in addition thereto, an additional privilege or license tax measured by some reasonable method for ascertaining the volume of business transacted in the State. In Albertson *v.* Wallace, supra, it is said: "We see no just objection to the mode adopted for ascertaining and determining the amount of the privilege tax and making it dependant upon the extent of the business of which the amount of the aggregate purchases may be as accurate a test or measure as any other that could be adopted. This mode of taxing is, in our opinion, eminently fair and reasonable in its operation. A specific tax of a definite sum upon a trade, without regard to the extent of the trader's operations, and pressing with the same force on one whose business is small as upon the large operator, would be very unequal. The ability to pay increases with an increased and successful business, and it is just and proper to gauge the sums to be paid upon that principle. This is what the statute undertakes to do, and no more, and it lies within the discretion of the taxing power to levy the privilege tax under this rule."

In requiring the payment of a head tax by dealers in horses and/or mules, the General Assembly did not levy a tax on the privilege or right to purchase horses and/or mules, nor did it levy an ad valorem tax on the animals purchased, but the statute expressly levies the tax on every person, firm or corporation engaged in the business of purchasing horses and/or mules for the purpose of resale. The General Assembly adopted this method as a fair and

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reasonable one for ascertaining the amount of such tax to be paid, in addition to the annual license tax. In determining whether or not the power to tax has been exercised in a "just and equitable manner," the Court may take into consideration the fact that in levying a particular license or privilege tax upon a business, such business is exempt from some other comparable tax. Cudahy Packing Co. *v.* Minnesota, 246 U. S., 450, 62 L. Ed., 827; Maine *v.* Grand Trunk Railway Co., 142 U. S., 217, 35 L. Ed., 994; Powell *v.* Maxwell, Comr. of Rev., 210 N. C. 211-186 S. E. 326; Johnson *v.* Gill, Comr. of Rev., 224 N. C., 638, 32 S. E. (2d.), 30. In view of the fact that the sales of horses and/or mules have been exempted form the 3% sales tax, and the head tax substituted, we think the levy is just and equitable and not in conflict with the provisions of our State Constitution.

The appellant also attacks the validity of the head tax on the ground that the Act discriminates as between local and interstate commerce, in that, under the terms of the Act, the tax does not apply to North Carolina bred horses and/or mules. The statute provided that " 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale either at wholesale or retail." We do not think there is any ambiguity in the above provision of the statute, but that it is clear that the aggregate amount of the head tax is measured by the number of horses and/or mules purchased for resale, except such purchases as may be expressly exempted therefrom by other provisions in the statute.

The amount of the tax to be paid at the time of obtaining the annual license is graduated according to the number of carloads of horses and/or mules purchased for resale. For the purpose of calculating the amount of the tax due under the above schedule, a carload of horses and/or mules shall be twenty-five. We do not think the general levy is changed or limited by a further provision in the Act that "purchases shall include horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this State by railroad or brought in otherwise." We are of the opinion this further

provision was inserted to emphasize the fact that all the horses and/or mules brought into the State may not be shipped over railroads or in carload lots, but that the tax is assessed on all horses and/or mules brought in regardless of the manner of transportation.

The appellant further contends the levy is limited to foreign bred horses and/or mules, since the head tax on the business of purchasing horses and/or mules for resale, does not become due and payable until the dealer receives such animals "within this State." However, we think this provision in the statute merely fixed the time the tax becomes due and payable and applies with equal force to purchases made within the State. It simply means the dealer is not required to pay the tax when he purchases horses and/or mules for resale until such animals come into his possession within the State, regardless of the date of purchase or the origin of the shipment.

An act of the General Assembly will not be held invalid as violative of the Constitution unless it so appears beyond a reasonable doubt. And when there is reasonable doubt as to the validity of a statute, such doubt will be resolved in favor of its constitutionality. Brumley *v.* Baxter, 225 N. C., 691, 36 S. E. (2d.), 281, 162 A. L. R., 931; Turner *v.* Reidsville, 224 N. C., 42, 29 S. E. (2d.) 211; Bridges *v.* Charlotte, 221 N. C., 742, 20 S. E. (2d), 825; Morris *v.* Holshouser, 220 N. C., 293, 17 S. E. (2d.), 115, 137 A. L. R. 733; Snyder *v.* Maxwell, 217 N. C., 617, 9 S. E. (2d.), 19; Tobacco Co. *v.* Maxwell, 214 N. C., 367, 199 S. E., 405. If a statute is susceptible to two interpretations, one constitutional and the other not, the former will be adopted. State *v.* Lueder, 214 N. C., 558, 200 S. E., 22; State *v.* Williams, 209 N. C., 57, 182 S. E., 711.

The remaining question is to determine whether or not this Section of our Revenue Act imposes an undue burden upon interstate commerce.

It is well settled that a State cannot levy a tax which directly or indirectly imposes an undue burden upon interstate commerce. Gwin, White & Prince *v.* Henneford, 305 U. S., 434, 83 L. Ed., 272; Baldwin *v.* Seelig, 294 U. S., 511, 79 L. Ed., 1032; 101 A. L. R., 55. This does not mean however, that interstate commerce is to be relieved wholly of

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state taxation. In the case of Western Live Stock *v.* Bureau of Revenue, 303 U. S., 250, 82 L. Ed., 823, Stone, C. J., Speaking for the Supreme Court of the United States, said: "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' • • • and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business."

The appellant is relying strongly upon the case of Gwin, White & Prince *v.* Henneford, supra, in which the State of Washington undertook to levy a tax measured by the gross receipts of the appellant derived from its business of marketing fruit shipped from the State of Washington to points outside the State, including foreign countries. The appellant was engaged exclusively in interstate commerce. The tax was held invalid because it discriminated against interstate commerce, in that it imposed upon it, merely because interstate commerce was being done, the risk of a multiple burden to which local commerce was not exposed.

In the case of Western Live Stock *v.* Bureau of Revenue, supra, the State of Mexico levied a privilege tax of 2% of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The appellants, who sold to advertisers outside the State, space in a magazine they published in New Mexico and circulated to subscribers within and without the State, challenged the validity of the tax on the ground that it was an undue burden on interstate commerce. The Court said: "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intra and interstate. American Mfg. Co. *v.* St.

Louis, supra (250 U. S., 462, 33 L. Ed., 1087, 39 S. Ct. 522). The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold." And in American Mfg. Co. *v.* St. Louis, supra, the Court said: "The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory."

In applying the principle laid down in the above decisions, we hold the tax under consideration is a levy on a local business for the privilege of engaging in such business, and does not place a burden upon interstate commerce. Powell *v.* Comr. of Revenue, supra. Therefore, the risk of multiple taxation is not involved. Consequently, the further contention that the various exemptions contained in the Act make it discriminatory and in contravention of the commerce clause, is without merit.

The General Assembly has exempted those engaged in the business of buying and selling horses and/or mules from paying the head tax on certain purchases, exchanges and repossessions. The law simply provides: (1) A dealer is relieved of the payment of a head tax when purchasing horses and/or mules from another dealer within the State who has paid the tax; (2) That in selling horses and/or mules, the dealer will be exempt from paying a head tax on any horses and/or mules he may accept in part payment thereof; and (3) Such dealer is exempted from paying an additional head tax on any horses and/or mules he may find it necessary to repossess as a result of the nonpayment of the original sales or purchase price. Whether or not the General Assembly acted wisely in granting these exemptions, is not before us for decision. We do think, however, it had the power to grant them without violating any of the provisions of our State or Federal Constitution. In levying a tax for the privilege of engaging in business, certain transactions may be exempted from tax liability so long as the exemptions apply alike to all who are engaged in business within the particular classification and "rea-

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sonable and pertinent bases for said classification and exemptions are readily discernible," Leonard *v.* Maxwell, Comr. of Revenue, supra. Smith *v.* Watkins, supra; Mercantile Co. *v.* Mount Olive, supra; Cobb v. Commissioners, 122 N. C., 307, 30 S. E., 338; Stewart Machine Co. *v.* Davis, 301 U. S., 548, 81 L. Ed., 799, 109 A.L.R., 1293.

In granting these exemptions we find no arbitrary or unjust exercise of the "'power to tax" on the part of the General Assembly.

The judgment of the Court below, is

Affirmed.

BARNHILL, *J.*, dissenting in part:

Insofar as the majority conclude that the "per carload" privilege tax levied under G. S. 105-47 is valid and enforceable I concur. However, I cannot subscribe to the conclusion that the additional "per head" tax is a license or privilege tax and as such is a lawful exercise of the taxing power. In my opinion it constitutes an undue and unlawful burden on interstate commerce.

North Carolina is not a stock-raising state. The number of horses and mules raised in this State for sale on the market is so negligible they constitute only an infinitesimal fraction of the total. Certainly 98% or more are shipped into the State. S. *v.* Vick, 213 NC 235, 195 SE 779. Perhaps the consciousness of this fact prompted the Legislature, in defining "purchase," to use the significant language "whether such horses and/or mules are shipped into this state by railroad or brought in otherwise;" and later to provide that the tax "shall be due and payable immediately upon receipt of such horses and/or mules within this state."

Under the taxing provision of the Act, A buys horses and mules out of the State and has them shipped into the State for resale. He must pay a franchise tax of $3.00 per head. He resells by carload lot to B, C, and D, dealers who purchase for resale. They pay the carload tax but pay no per head tax. Thus the purchaser whose mules are shipped into the State pays while the dealer whose source of supply is within the State does not pay.

This, in a nut shell, presents my views. The question is one of construction. If I correctly read the statute it is, as a privilege tax, so clearly in contravention of the Federal Constitution as interpreted by the United States Supreme Court further discussion or citation of authority is unnecessary. I vote to affirm as to the per carload tax and reverse as to the per head tax.

DEVIN, *J.*, joins in this opinion.

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